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PROCEEDINGS AND ORDERS

DATE: 111984

CASE NBR 84-1-05350 CSY
 SHORT TITLE Maxwell, Frederick
 VERSUS Pennsylvania

DOCKETED: Aug 20 1984

Date	Proceedings and Orders
Jul 10 1984	Application for extension of time to file petition and order granting same until August 22, 1984 (Brennan, July 11, 1984).
Aug 20 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Sep 20 1984	Brief of respondent Pennsylvania in opposition filed.
Sep 27 1984	DISTRIBUTED. October 12, 1984
Oct 11 1984	Reply brief of petitioner Frederick M. Maxwell filed.
Oct 18 1984	REDISTRIBUTED. October 26, 1984
Oct 29 1984	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)
Oct 31 1984	***** Petition for rehearing filed.
Oct 31 1984	Application to suspend the effect of the order denying

CONTINUE {

PROCEEDINGS AND ORDERS

DATE: 111984

CASE NBR 84-1-05350 CSY
 SHORT TITLE Maxwell, Frederick
 VERSUS Pennsylvania

DOCKETED: Aug 20 1984

Date	Proceedings and Orders
Oct 31 1984	Application to suspend the effect of the order denying certiorari. (A-346).
Oct 31 1984	Above application referred to the Court per WJB for Nov. 9, 1984, conference.
Nov 7 1984	DISTRIBUTED. November 21, 1984. (Rehearing).
Nov 13 1984	The application to suspend the effect of the order denying certiorari presented to Brennan, J., and by him referred to the Court is denied. Brennan and Marshall, JJ., would grant the application.
Nov 13 1984	

PETITION
FOR WRIT OF
CERTIORARI

84-5350

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983



Alexander L. Stevens, Clerk

FREDERICK M. MAXWELL,

Petitioner,

- VS. -

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

DEVAL L. PATRICK
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

Attorney for Petitioner and
Counsel of Record



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IMPOSITION OF THE DEATH PENALTY IN CERTAIN CIRCUMSTANCES
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MERCY IS UNCONSTITUTIONALLY "MANDATORY" WITHIN THE PRO-
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No. 83-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1983

FREDERICK M. MAXWELL,
Petitioner,

- vs. -

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner Frederick M. Maxwell respectfully prays
that a writ of certiorari issue to review the judgment of the
Supreme Court of Pennsylvania in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Pennsylvania,
Eastern District, affirming petitioner's conviction and sen-
tence is not yet reported, Commonwealth v. Maxwell, No. J-282-83
(Pa. May 24, 1984), but is set forth in Appendix A.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was
entered on May 24, 1984. On July 11, 1984, this Court granted
petitioner's timely application for an extension of time in
which to file his petition through August 22, 1984. The Court's
order is attached as Appendix B. Jurisdiction of the Court is
invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Con-
stitution of the United States, which provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;
and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .

This case also involves Pennsylvania's criminal sentencing provisions governing executions, 42 Pa. Cons. Stat. Ann. § 9711, the text of which is attached as Appendix C.

STATEMENT OF THE CASE

After a 9-day trial in the Court of Common Pleas of Philadelphia (Stout, J.), Frederick M. Maxwell was convicted of first-degree murder and sentenced to death -- as required by Pennsylvania law, see 42 Pa. Cons. Stat. Ann. § 9711(c)(1) (iv) -- for the killing of Paul Kent, an encyclopedia salesman invited to the Maxwells' home. Of the 25 witnesses offered by the Commonwealth, however, only one linked petitioner to the crime. That one was Hilda Ann Gasper, who petitioner has contended is his common-law wife.

Gasper did not see the killing. She was able to offer only circumstantial, often contradictory testimony. She testified that Kent first came to the petitioner's home in response to a written request card, but that no sale was made because neither she nor petitioner had money. Kent was asked to come back again, at which time petitioner and his co-accused, Gary Mobley, planned to rob him. Kent returned as asked and visited with Mobley and petitioner in the dining room while Gasper was upstairs with the children.

Gasper testifies that while upstairs she heard two gunshots, that she came down to find Kent dead in a chair, and

that both Mobley and petitioner stood near. She did not testify about who ad the gun. Nor did she testify about who stood nearer Kent's body.

On cross examination, Gasper admitted that she cooperated with the prosecution under duress. She stated that her and petitioner's young son, Jason, was remanded to foster care soon after the killing, and that the prosecution advised her that "if [she] didn't cooperate with them that I would also be locked up and I would never see my son . . . our son again." Tr. Trans. 508. She also stated that at the time she was questioned by investigators she suffered from heroin addiction. Tr. Trans. 510-11. When asked by defense counsel if she had been frightened, Gasper responded, "I'm scared of everybody." Tr. Trans. 491.

Nevertheless, the jury convicted petitioner of first-degree murder, robbery and "possessing instruments of crime generally," and the case proceeded to sentencing. The prosecution introduced evidence of petitioner's prior criminal record and cited as further aggravation petitioner's conviction on the underlying robbery charge. Petitioner took the stand to reaffirm his innocence of the killing and express sorrow for the Kent family's loss. However, in the words of the Pennsylvania Supreme Court, petitioner's counsel "did not introduce any evidence of mitigating circumstances . . ." Commonwealth v. Maxwell, No. J-282-83, slip op. at 16 (Pa. May 24, 1984).

The prosecutor therefore argued for an automatic death sentence. He told the jury that

the law mandates that certain things be done in certain cases and in . . . certain types of muroer cases . . . the death penalty is proper. . . . This case is one of those cases.

Tr. Trans. 1245-46 (emphasis supplied). Similarly, although defense counsel argued for mercy, the trial court instructed the jury that it had no discretion in sentencing in these circumstances:

[Y]our verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances outweigh any mitigating circumstances.

Tr. Trans. 1266 (emphasis added). See also Tr. Trans. 1262.

Defense counsel objected to the instruction and to the statute on the ground that it was unconstitutionally vague.

Tr. Trans. 1268. The trial court overruled the objection, and the Pennsylvania Supreme Court affirmed. In so doing, the Pennsylvania court held: "Because appellant did not introduce any evidence of mitigating circumstances, it became unnecessary to 'weigh' opposing circumstances." Commonwealth v. Maxwell, slip op. at 16. The Court thus made clear -- consistent with prior precedent, Commonwealth v. Beasley, 475 A.2d 730, 738 (Pa. 1984) -- that it construes its death sentencing statute to require a death sentence in circumstances like these.

Petitioner now seeks review in this Court of Pennsylvania's mandatory death sentencing scheme.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A DEATH SENTENCING STATUTE WHICH PRECLUDES THE JURY'S DISCRETION TO EXERCISE MERCY IS UNCONSTITUTIONALLY "MANDATORY" WITHIN THE MEANING OF THE PROHIBITIONS OF THE EIGHTH AND FOURTEENTH AMENDMENTS

The Pennsylvania death sentencing statute differs from statutes which have been held constitutionally adequate in one important respect: in certain circumstances Pennsylvania requires the imposition of a death sentence. The statute states that

the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.

42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv)(emphasis supplied).^{1/}

The Pennsylvania Supreme Court has not modified that mandate, holding unequivocally that where "the jury [finds] at least one proper aggravating circumstance . . . and no mitigating circumstances, appellant's sentence of death is required."

Commonwealth v. Beasley, 475 A.2d at 738 (emphasis in original). Accordingly, the trial court twice instructed the jury that in petitioner's case it had no choice but to impose death. See Tr. Trans. 1262, 1266.^{2/} The prosecutor also argued that the

1/ In addition to Pennsylvania, 17 other states require the sentencer to impose a death sentence in certain circumstances. See Ala. Code § 13A-5-46(e)(3); Ariz. Rev. Stat. Ann. § 13-703(E); Cal. Penal Code § 190.3; Colo. Rev. Stat. § 16-11-103(6); Conn. Gen. Stat. Ann. § 53a-46a(e); Idaho Code § 19-2515(b); Ill. Ann. Stat. ch. 38, § 9-1(g),(h); Ind. Code Ann. § 35-50-2-9(g); Md. Ann. Code art. 27, § 413; Mont. Code Ann. § 46-18-305; N.J. Stat. Ann. § 2C:11-3(c)(3)(a); N.Y. Penal Law § 60.06, invalidated in People v. Smith, No. 235 (N.Y. July 2, 1984); Ohio Rev. Code Ann. § 2929.03(D)(2); Tenn. Code Ann. § 39-2-203(g); Tex. Penal Code Ann. § 37.071(e); Wash. Rev. Code Ann. § 10.95.080(1).

2/ The trial court instructed as follows:

jury was obliged to impose death.^{3/} Thus, although defense counsel argued for mercy, see Tr. Trans. 1237-42, the jury was both told and required by statute and precedent, to ignore its independent judgment and vote for a sentence of death.

The Court has held that

. . . a death sentence returned pursuant to a law imposing a mandatory death penalty . . . constitutes cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments.

Woodson v. North Carolina, 428 U.S. 280, 287 (1976). The Court has rejected mandatory statutes which merely require the sentencing authority to "determine whether conditions exist-

2/ (continued)

The Crimes Code provides that the verdict must be a sentence of death if the jury unanimously find at least one aggravating circumstance and no mitigating circumstances, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.

Tr. Trans. 1262. Later, the court reiterated the mandate:

Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances outweigh any mitigating circumstances.

Tr. Trans. 1266.

3/ The prosecutor admonished the jury that its only lawful verdict would be the death sentence:

If you hadn't said you would vote for a death sentence, you wouldn't be sitting here. So you are twelve people that promised and swore and took an oath to follow our law and abide by it, and you got to do it.

It's not pleasant. It's a mandatory function . . .

Tr. Trans. 1261. See Tr. Trans. 1245 ("the law mandates that certain things be done in certain cases . . .").

to impose a mandatory death punishment." S. Roberts v. Louisiana, 428 U.S. 325, 331 (1976). Although in Woodson and Roberts the Court condemned statutes in which the jury's moral judgment was excluded from the sentencing decision, the Court has not yet expressly addressed the propriety of death statutes which appeared to involve the jury in the death sentencing decision but which, once certain predicates have been established, have the Woodson and Roberts effect. Because the Commonwealth's statute -- by excluding the jury from the decision whether death is the appropriate sentence -- creates "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 589, 605 (1976), the Court should grant the writ and give plenary review to the question presented here.

The risk that the jury may have returned a death sentence because it felt its judgment constrained is one of constitutional significance. Even though the jury was offered no evidence of mitigating factors to weigh against those in aggravation, it is "entirely possible" that the jury might "yet feel that a comparison of the totality of the aggravating factors with the totality of mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that 'death is the appropriate punishment in a specific case.'" Smith v. North Carolina, ___ U.S. ___, 74 L.Ed.2d 622, 623 (1982)(Stevens, J., opinion respecting denial of certiorari)(quoting Lockett, 438 U.S. at 601).

The recent opinions of the Court underscore the importance of the jury's exercise of the full range of its judgment in making the critical decision of life or death. "Once the jury finds that the defendant falls within the

legislatively defined category of persons eligible for the death penalty, . . . the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment." California v. Ramos, ____ U.S. ___, L.Ed.2d 1171, 1185 (1983). Death cannot be mandated, for the jury must be free to consider both the individual before it and society's myriad values, including mercy. "It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." Barclay v. Florida, ____ U.S. ___, 77 L.Ed.2d 1134, 1144 (1983)(plurality opinion). Indeed: "The sentencing process assumes that the trier of fact will exercise judgment in light of his or her background, experiences, and values." Id. at 1157 (Stevens, J., concurring). It is only in that way that "sentencing juries 'maintain a link between contemporary community values and the penal system. . . .'" Id. (quoting Gregg v. Georgia, 428 U.S. 153, 190 (1976)).

It is thus not surprising that, in almost every opinion upholding the Florida or Georgia statute on its face or as applied, the Court has noted that the statute allows the jury, once it has evaluated aggravating and mitigating factors, to decide whether death is ultimately appropriate. In Barclay, for example, the plurality noted that the Florida statute allows the sentencer to determine that the aggravating factors are not "sufficient" to impose death. 77 L.Ed.2d at 1146 n.12. Similarly, the concurring opinion in Barclay notes that: "In both Florida and Georgia, even if the statutory threshold has been crossed and the defendant is in the narrow class of persons who are subject to the death penalty, the sentencing authority is not required to impose the death penalty." Id. at 1152. Indeed, Justice Stevens's opinion identified an entire class of Florida

cases "in which statutory aggravating circumstances exist, and arguably outweigh statutory mitigating circumstances, but they are insufficiently weighty to support the ultimate sentence. . . ." Id.

The opinions upholding the Georgia statute also recognize this critical feature. Thus, in Zant v. Stephens, ____ U.S. ___, 77 L.Ed.2d 235 (1983), the Court noted Gregg's approving observation that: "The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court. . . ." Stephens, 77 L.Ed.2d at 249 n.13 (quoting Gregg, 428 U.S. at 196-97). And in Gregg itself, the Court noted that: "The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute. . . ." 428 U.S. at 222.

Here, as here, the jury was constrained to base its verdict on the mere weight of the aggravating and mitigating factors, "the sentencing process [is] transformed into a rigid and mechanical parsing of statutory . . . factors." Barclay, 77 L.Ed.2d at 1144. But the Eighth Amendment requires an "individualized determination," Stephens, 77 L.Ed.2d at 251 (emphasis in original), "that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. at 305. The Commonwealth's statute resulted in a death sentence detached from the jury's assessment of its appropriateness, destroying the "link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Gregg, 428 U.S. at 190 (quoting Witherspoon v.

Illinois, 391 U.S. 510, 519 n.15 (1968), and Trop v. Dulles,
356 U.S. 86, 101 (1958)).

CONCLUSION

For the reasons noted above, the Court should grant
the writ for certiorari.

Respectfully submitted,



DEVAL L. PATRICK
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

ATTORNEY FOR PETITIONER
AND COUNSEL OF RECORD

Dated: August , 1984.

APPENDIX A:

Opinion of the Supreme Court of Pennsylvania in
Commonwealth v. Maxwell, No. J-282-83 (May 24, 1984)

[J-282-83]
IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PENNSYLVANIA, : No. 42 E.D. Appeal Dkt. 1982
Appellee : Appeal from the Judgment of the
vs : Court of Common Pleas of
Philadelphie, Trial Division,
Criminal Section Imposed on
Information No. 1442,
November Term, 1980
FREDERICK MAXWELL, : ARGUED: October 20, 1983
Appellant

OPINION

MR. JUSTICE McDERMOTT.

Filed: May 24, 1984

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

The appellant here appeals from a sentence of death.¹ If the facts alleged and resolved by the jury are legally predicated, they depict a "wickedness of disposition, a hardness of heart and recklessness of consequence," that are the very name and nature of murder. With the announced intention of robbery and "killing if necessary," appellant lured an encyclopedia salesman to his home. The victim came, hoping to show his books to a concerned and loving father. As he sat in appellant's home, he knew not the frigid cruelty that was to engulf him. He knew not that on the morrow his own son would find him, thrown into the cellar in a trash bag.

¹Pursuant to 42 Pa.C.S. §9711(h)(1), a person sentenced to death has the right to automatic review by this Court.

Appellant challenges the verdict below on numerous grounds.² These challenges center around violation of Pennsylvania Rules of Criminal Procedure Rule 1100, a warrantless search, marital privilege, prosecutorial remarks, and infliction of cruel and unusual punishment due to the imposition of the death penalty. We reject these challenges and affirm.³

The pertinent facts are summarized as follows: In May of 1979, appellant sent a card to Encyclopedia Britannica requesting a salesman to call regarding the purchase of a set of the encyclopedias. Paul Kent visited the appellant and his live-in paramour, Ann Gasper, at appellant's house, but no encyclopedias were purchased because neither of them had any funds.

² Appellant also has raised, by pro se letters addressed to this Court, numerous allegations of ineffectiveness of counsel. These assertions include: (1) failing to visit appellant at prison; (2) drafting a trial brief without consulting appellant; (3) failing to investigate how the cellar door was broken; (4) failing to challenge the Commonwealth's evidence that appellant had pled guilty to two violent felonies committed in New York; (5) failing to raise that the prosecutor was a dishonorable man; (6) turning over to the prosecutor a statement written by appellant; (7) failing to prove at trial that appellant's girlfriend was his wife; (8) failing to object to a question asked by the prosecutor during the sentencing hearing; (9) failing to object to the admission of appellant's handwriting exemplars; and (10) failing to object to a Commonwealth witness' usage of notes to refresh his recollection. After having carefully reviewed the record and the applicable precedent, we find these claims to be meritless.

³ Although appellant fails to raise the issue of sufficiency of the evidence, this Court in Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982) cert. denied, U.S., 103 S.Ct. 2444, reh. den., U.S., 103 S.Ct. 31 (1983) stated that it would conduct an independent review of the record for sufficiency in capital punishment cases. Our review of the entire record, with all reasonable inferences in favor of the Commonwealth, Commonwealth v. Kichline, 468 Pa. 263, 361 A.2d 28; (Footnote Continued)

On the morning of June 5, 1979, appellant instructed Ann Gasper to telephone Mr. Kent's office and ask Mr. Kent to return to appellant's household since they now had the necessary funds to buy the books. According to Ann Gasper's testimony, appellant told her and co-defendant Gary Mobley, who had been present in appellant's house that day, that he was going to rob the salesman and kill him if necessary. At appellant's request Gary Mobley went to a nearby store to buy some trashbags. Appellant told Ms. Gasper to go upstairs and get the children ready as they were going to the store. In the meantime, Mr. Kent arrived at appellant's house and for a brief while they discussed the books.

Upstairs Ann Gasper heard two gunshots. When she descended Ms. Gasper observed Paul Kent's body slumped in a dining room chair, dead. He had been shot twice in the head at close range. Appellant told Ms. Gasper to wash Mr. Kent's blood from the wall, carpet and chair while he and Gary Mobley stuffed the lifeless victim in trash bags and carried it to the cellar, where they removed the victim's wallet. Taking Mr. Kent's car the trio drove to Wanamaker's Department Store in Philadelphia, where they purchased a purse and two television sets with the victim's credit card, being the exchange for Paul Kent's life. The television sets were never claimed at the pick-up department because the Wanamaker's salesman became suspicious of appellant's purchase and had the sets returned to his department.

(Footnote Continued)
(1976), discloses that the evidence is sufficient to sustain the convictions for murder in the first degree.

The threesome then returned to appellant's house. Gary Mobley promised appellant that he would dispose of the corpse the next night when he would be least visible. The following morning, appellant broke the basement door to prevent his teenage girls from entering the basement. Ms. Gasper wrote a note to the children informing them of the basement door and that she and appellant were out shopping and would return later that evening.

Instead, appellant and Ms. Gasper drove the victim's car to New York City. Later that same afternoon the victim's son went to appellant's home to ask the whereabouts of his father.

Appellant's daughters searched the house and discovered the victim's body in the trashbags. The girls went outside to a pay booth to telephone their grandmother. En route they approached two police officers who were observing the house from a car across the street and informed them of what they had seen. The police had been waiting for the arrival of a search warrant for appellant's house. The police officers requested permission to enter the house and the daughters granted it.

The fugitives never returned from New York since they were aware from appellant's mother that the police were looking for them. Fourteen months later appellant was apprehended by New York Police.

Appellant initially alleges that the trial court erred in denying his motion to dismiss the charges because he was denied his right to a speedy trial. Appellant claims that a complaint was filed against him on June 6, 1979, and that his trial did not commence until April 24, 1981.

Pennsylvania Rule of Criminal Procedure 1100 specifically provides that a defendant must be brought to trial within one hundred eighty days from the date on which the complaint is filed. Commonwealth v. Sanford, 497 Pa. 442, 441 A.2d 1220 (1982). Subsection (c)(1), (2) and (3) of Rule 1100 permits the Commonwealth to apply to the court for an order extending the time for commencement of trial upon a showing that the trial could not commence within the prescribed time period despite the "due diligence" of the Commonwealth.⁴ Although this Court has yet to

⁴The relevant provisions of Rule 1100 of the Pennsylvania Rules of Criminal Procedure read:

* * * *

(a)(2) Trial in a court case in which a written complaint is filed against the defendant after June 30, 1974 shall commence no later than one hundred eighty (180) days from the date on which the complaint is filed.

* * * *

(b) For the purpose of this Rule, trial shall be deemed to commence on the date the trial judge calls the case to trial, or the defendant tenders a plea of guilty or no contest.

(c)(1) At any time prior to the expiration of the period for commencement of trial, the attorney for the Commonwealth may apply to the court for an order extending the time for commencement of trial.

(2) A copy of such motion shall be served upon the defendant through his attorney, if any, and the defendant shall also have the right to be heard thereon.

(3) Such motion shall set forth facts in support thereof, and shall be granted only upon findings based upon a record showing that trial cannot be commenced within the prescribed period despite due diligence by the

(Footnote Continued)

precisely define "due diligence" we have on past occasions concluded that such a showing depends on the circumstances of each particular case. See Commonwealth v. Roman, 494 Pa. 440, 431 A.2d 936 (1981); Commonwealth v. Romberger, 490 Pa. 258, 416 A.2d 458 (1980); Commonwealth v. Ehredt, 485 Pa. 191, 401 A.2d 358 (1979); Commonwealth v. Mitchell, 472 Pa. 553, 372 A.2d 826 (1977); Commonwealth v. Mayfield, 469 Pa. 214, 364 A.2d 1345 (1976).

Moreover, this Court has held that Rule 1100 requires that the Commonwealth prove by a preponderance of evidence that it acted with due diligence in bringing a case to trial. Commonwealth v. Ehredt, *supra*.

(Footnote Continued)

Commonwealth and, if the delay is due to the court's inability to try the defendant within the prescribed period, upon findings based upon a record showing the causes of the delay and the reasons why the delay cannot be avoided.

* * * *

(d) In determining the period for commencement of trial, there shall be excluded therefrom:

(1) the period of time between the filing of the written complaint and the defendant's arrest; provided that the defendant could not be apprehended because his whereabouts were unknown and could not be determined by due diligence;

(2) any period of time for which the defendant expressly waives Rule 1100;

(3) such period of delay at any stage of the proceedings as results from:

(i) the unavailability of the defendant or his attorney;

(ii) any continuance granted at the request of the defendant or his attorney.

In this case appellant argues that the Commonwealth failed to establish its due diligence since it never communicated to him through the public, by advertisements or legal notices, a warrant for his arrest, and that because of such lack of notice he did not know that he was wanted in the Paul Kent killing. This claim is as frivolous as it is macabre.

The record reveals that appellant was the focal point of a massive manhunt. He was wanted not only by local authorities, but also by state and federal authorities throughout seven states. Furthermore, appellant's own testimony contradicts this claim. While in New York, they moved to various addresses in an effort to escape apprehension. From New York Ms. Gasper telephoned appellant's mother who told her that her son should turn himself in because the police were looking for him. Ms. Gasper relayed this information to appellant. Nevertheless, appellant continued to elude police over the next fourteen months.

A person who callously kills another human being, flees to another state to conceal his whereabouts, and abandons his normal pattern of living and his children without any explanation cannot later claim he was unaware that he was wanted by the police. Because appellant intentionally concealed himself from this manhunt he cannot now complain. Moreover, under subsection (d)(1) of Rule 1100, the fourteen months that appellant evaded the police after the June 6 complaint was filed are explicitly excluded from calculating the 180 day period. Furthermore, appellant waived this issue when he appeared before Judge Ribner and requested a three month extension of Rule 1100 for the purpose of conducting further

investigation. This unequivocal on-the-record waiver of Rule 1100 provides a further ground for rejecting this claim. Commonwealth v. Evans, 489 Pa. 85, 413 A.2d 1025 (1980).

Appellant next maintains that his Fourth Amendment right to privacy was infringed by the warrantless search of his home. There the Philadelphia police found the body of Paul Kent, which appellant claims should have been suppressed. The trial judge justified the validity of the warrantless entry on three theories: consent, abandonment, and exigent circumstances. Conversely, appellant argues that the trial court erred on all three grounds.

Appellant first contends that the police intimidated Yolanda, appellant's daughter, thus negating her consent. We have previously held that a mere acquiescence to a claim of lawful authority does not discharge the burden that consent must be freely and voluntarily given. Commonwealth v. Davenport, 453 Pa. 235, 306 A.2d 85 (1973), later app. 462 Pa. 543, 342 A.2d 67 (1975).

Appellant, however, ignores the uncontradicted evidence that it was Yolanda who approached the police officers in their car and asked them to come inside the house because she wanted to show them what was in the trash bag in the basement. The police neither forced themselves upon Yolanda nor used their authority as a pretext to gain entry into appellant's house. The police officers' actions in searching the house were in direct response to Yolanda's directives. There was nothing intimidating in this scenario.

Nevertheless, appellant argues that Yolanda was incapable of giving consent because she was only sixteen years of age. Although age is one element to acknowledge in ascertaining whether

consent was given willingly, minority status alone does not prevent one from giving consent. In Re: Anthony F., 293 Md. 146, 442 A.2d 975 (1982) (Sixteen year old sister of juvenile gave consent); Dovle v. State of Alaska, 633 P.2d 306 (Alaska App. 1981) (Fourteen year old son gave consent); State of Iowa v. Folkens, 281 N.W.2d 1 (Iowa 1979) (Fourteen year old son in charge of house while mother was absent gave consent); United States v. Bethea, 598 F.2d 331 (4th Cir. 1979) cert. denied, 444 U.S. 8601, 100 S.Ct. 124 (1979); People v. Swansey, 62 Ill. App. 3d 1015, 20 Ill. Dec. 211, 379 N.E.2d 1279 (1978).

The record is devoid of any evidence that would indicate that Yolanda's age itself prevented her from giving a valid consent. Nor is there evidence of any emotional immaturity or mental instability. On the contrary the record reveals that Yolanda made a very rational decision when she left her house after discovering the body. The evidence establishes that consent existed irrespective of Yolanda's age.

Secondly, appellant argues that the doctrine of exigent circumstances is inapplicable to this case because "the police had every reason to believe the decedent was indeed dead". This mordant hindsight overlooks one of the limited reasons for this warrantless exception.⁵ Generally, police are allowed to make

⁵The limited application of the exigent circumstance doctrine was discussed by this Court in Commonwealth v. Norris, 496 Pa. 306, 446 A.2d 246 (1982) which stated that this doctrine existed only in the following situations: "(1) when the officers may in good faith believe that they or someone within are in peril
(Footnote Continued)

warrantless searches when a life threatening emergency exists. Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978). Accord Commonwealth v. Norris, 498 Pa. 308, 446 A.2d 246 (1982) (Permits search "when the officers may in good faith believe that they or someone within are in peril of bodily harm.")

Without doubt the police in this case had reason to believe that Paul Kent was in appellant's house and in need of immediate aid. The victim had been reported missing twenty-four hours earlier by his wife; his last whereabouts were traced to appellant's house; his credit card had been used by someone else; and the police had been confronted by appellant's daughter who told them that there was an unfamiliar large trash bag in the basement of which she was afraid, and that she had found an unidentified pair of shoes and a briefcase. Moreover, because a search warrant was in transit the police would have had no reason to enter appellant's house, except to aid the victim. The lower court was correct when it reasoned that "there was a likelihood of a living, but injured, human being inside the premises."⁶

(Footnote Continued)
of bodily harm. (citation omitted); (2) when the officers have a basis for assuming that a suspect is 'armed or might resist arrest' (citation omitted); (3) when there is 'some affirmative indication to support a belief that evidence is being destroyed' (citation omitted); (4) when there are similar indications that 'the person to be arrested is fleeing' (citations omitted); or (5) when 'the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture.' (citations omitted)"

⁶Appellant also challenges the trial court's ruling that he no longer had an expectation of privacy because he abandoned his house by fleeing to New York. We need not discuss the merits of
(Footnote Continued)

Appellant next argues that the trial court erred in allowing Ann Gasper to testify against him at his trial. Appellant argues that since he and Ann Gasper lived together there was a common-law marriage and thus she should have been precluded from testifying under the marital incompetency statute 42 Pa.C.S. §5913.⁷ That statute provides that spouses are neither competent nor permitted to testify against each other in criminal proceedings.⁸ Moreover, the basis for invoking the marital privilege is the existence of a valid marriage. See Commonwealth v. Clavton, 395 Pa. 321, 151 A.2d 88 (1959); Commonwealth v. Jones, 224 Pa. Super. 352, 307 A.2d 397 (1973) (Testimony of an alleged common-law wife admissible). In Clavton, *supra*, this Court held that a wife was a competent witness against her second spouse because she had never divorced her first husband and he was still alive. In so

(Footnote Continued)
this claim since the warrantless entry has already been justified on two separate and independent grounds.

⁷Act of May 23, 1887, P.L. 158, No. 89, Section 2(b), 19 P.S. §683, as amended, 42 Pa.C.S. §5913.

⁸42 Pa.C.S. §5913 reads in its entirety:

Spouses as witnesses against each other

Except as otherwise provided in this subchapter, in a criminal proceeding husband and wife shall not be competent or permitted to testify against each other, except that in proceedings for desertion and maintenance, and in any criminal proceeding against either for bodily injury or violence attempted, done or threatened upon the other, or upon the minor children of said husband and wife, or the minor children of either of them, or any minor child in their care or custody, or in the care or custody of either of them, each shall be competent merely to prove the fact of marriage, in support of a criminal charge of bigamy alleged to have been committed by or with the other.

holding, the Clayton Court reasoned that "the test is not whether the parties to an allegedly lawful marriage believe that they are lawfully married; the test is whether in law they are legally married." Id. 395 Pa. at 528.

The uncontradicted evidence established in the trial court showed that Ann Gasper, at the time of Mr. Kent's execution, was still legally married to one Calvin Brandon. There was no evidence proving that Ms. Gasper and Mr. Brandon had been divorced. As the trial court found, appellant and Ms. Gasper were merely cohabitating. Consequently, appellant has no legal basis for asserting the marital incompetency privilege and the testimony was properly admitted.

Appellant's fourth assignment of error relates to the exclusion of potential veniremen who indicated an opposition to the death penalty. Appellant contends that the exclusion of such veniremen resulted in a prosecution-prone jury. This argument is meritless. Simply questioning potential veniremen on their position regarding the death penalty, or excluding those who are strongly opposed to it and cannot impose it under any conditions, does not necessarily produce a prosecution oriented jury.

Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968); Commonwealth v. Brown, 462 Pa. 578, 342 A.2d 84 (1975); Commonwealth v. Kenney, 449 Pa. 562, 297 A.2d 794 (1972); Commonwealth v. Speller, 445 Pa. 32, 262 A.2d 26 (1971).

Appellant complains next about the prosecutor's summation, which he claims improperly disparaged his trial

counsel's ethics and trial tactics. During his closing argument, the prosecutor recited:

Let me make a couple comments about what counsel said -- some of the things counsel said. There is an old adage in the law if you got the facts on your side, you argue the facts, if you got the law on your side, you argue the law, if you have neither, you blow smoke. And that is what counsel did for two hours yesterday. By putting me on trial he was blowing smoke.

(Notes of Testimony at 1072-73.)

Appellant argues that this precise metaphor prejudiced him in the jurors' eyes and prevented them from rendering an impartial verdict.

This Court has recently defined the standard for ordering a new trial in a case where a prosecutorial statement is deemed improper. Commonwealth v. Upsher, 497 Pa. 621, 444 A.2d 90 (1982). There we concluded that, although a prosecutor's statement may be inappropriate, a new trial will not be granted unless it is inevitable that the prosecutor's remark prejudices the defendant to such a degree that it prevents the jury from weighing the evidence and rendering a true verdict. Id., 497 Pa. at 627, 444 A.2d at 92. See also Commonwealth v. Scarpino, 494 Pa. 421, 431 A.2d 926 (1981) (New trial warranted when unavoidable effect of prosecutorial comment is to deprive defendant of fair trial); Commonwealth v. Martin, 461 Pa. 289, 336 A.2d 290 (1975); Commonwealth v. Goosby, 450 Pa. 609, 301 A.2d 673 (1973).

Furthermore, "[T]he prejudicial effect of the district attorney's remarks must be evaluated in the context in which they occurred." Commonwealth v. Smith, 490 Pa. 380, 416 A.2d 966

(1980); See also, Commonwealth v. Brown, 489 Pa. 285, 414 A.2d 70 (1980); Commonwealth v. Perkins, 473 Pa. 116, 373 A.2d 1076 (1977). However, a reversal is not an automatic formality for every intemperate or improper comment by the prosecution. A trial judge will not be reversed for failing to provide an appropriate remedy unless there has been an abuse of discretion. Commonwealth v. Stoltzfus, 462 Pa. 43, 337 A.2d 873 (1975).

In reviewing the prosecutor's statement we do not find it to be such as to require a new trial. The remark complained of was in response to the personal attack made upon the prosecutor during appellant's counsel's summation. There was nothing inappropriate about the prosecutor's comment when reviewed in the situation in which it was made.

Appellant's sixth complaint challenges the constitutionality of the death penalty statute⁹ on the grounds that it violates due process and is cruel and unusual punishment under both the Pennsylvania and United States Constitutions.¹⁰

Recently, this Court has thoroughly analyzed these precise arguments and rejected them. Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), cert. denied, ____ U.S. ___, 103

S.Ct. 2444, reh. den. ____ U.S. ___, 104 S.Ct. 31 (1983). There this Court held that the death penalty is neither per se cruel punishment nor offensive to due process under either the Pennsylvania or Federal Constitutions. Id. 454 A.2d at 963-67.

Finally, appellant argues that the death sentencing procedure statute¹¹ is unconstitutionally vague because it does not provide an adequate standard of weighing aggravating against mitigating circumstances. Specifically, he points to the language "... if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances ..." 18 Pa.C.S.A. §9711 (c)(1)(IV). Although this claim was also considered and rejected by this Court in Zettlemoyer, supra, we will address the merits of this contention.

During appellant's sentencing hearing neither he nor his counsel presented any evidence of mitigating circumstances. The only evidence presented at this hearing was appellant's own testimony denying he killed Mr. Kent, a fact which the jury had previously resolved against him. Consequently, the jury found no mitigating circumstances. Hence, the only consideration required by the jury was whether the Commonwealth had proven two aggravating circumstances beyond a reasonable doubt.¹² Because appellant did

⁹Act of December 6, 1972, P.L. ___, No. 334, effective June 6, 1973, as amended, 18 Pa.C.S. §1101.

¹⁰Appellant also challenges this statute on the theory that it violates equal protection of the law alleging that it has been applied in a discriminatory manner in Pennsylvania. Appellant has failed to support his position with any case law or other authoritative sources, and we see no basis upon which to accept this argument.

¹¹Act of October 15, 1980, P.L. 693, No. 142 §401(a), transferred to chapter 97 of the Judicial Code, 42 Pa.C.S. §9711, previously, 18 Pa.C.S. §1101.

¹²The two aggravating circumstances the Commonwealth was required to prove beyond a reasonable doubt as instructed by the trial court were: (1) whether the defendant committed a killing (Footnote Continued)

not introduce any evidence of mitigating circumstances, it became unnecessary to "weigh" opposing circumstances. This Court has consistently held that a claimant cannot challenge the constitutionality of a statute abstractly; he is afforded such right only if it is sought to be enforced in his particular case. Commonwealth v. One 1976 Ford Truck Van, 492 Pa. 541, 424 A.2d 1323 (1981) cert. denied, 454 U.S. 819, 102 S.Ct. 99 (1981); Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980); Knowles' Estate, 295 Pa. 571, 145 A.797 (1929).

In this case, because appellant did not introduce any mitigating circumstances, the jury never had to consider the application of 42 Pa.C.S. §9711 (c)(4); accordingly, appellant cannot now question it. Cf: Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442 (1977) cert. denied, 438 U.S. 914, 98 S.Ct. 3143 (1978). (Person has automatic standing to challenge death penalty statute which has been held unconstitutional.)

Finally, we address, sua sponte,¹³ whether the sentence of death imposed by the jury in the instant case is excessive or disproportionate to those of other similarly situated defendants. 42 Pa.C.S. §9711(h)(3)(iii). Commonwealth v. Frey, ____ Pa. ____, ____ A.2d ____ ([J-260-83] filed 4/13/84).

(Footnote Continued)
while in the perpetration of a felony, 42 Pa.C.S. §9711 (d)(6) and (2) whether the defendant had a significant history of felony convictions involving the use or threat of violence to the person 42 Pa.C.S. §9711(d)(9).

¹³ We note that the United States Supreme Court in Pulley v. Harris, ____ U.S. ___, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) has (Footnote Continued)

Our analysis is aided by a comprehensive study¹⁴ conducted by the Administrative Office of Pennsylvania Courts (hereinafter "AOPC") which has reviewed the sentences sought and obtained for all convictions for murder in the first degree between September 13, 1978 and February, 1984, the period of time for the relevant and effective sentencing procedures. Included in the study are the facts and circumstances of the crimes, the gender, race and age of the defendant and victim, the defendant's prior criminal record, if any, and other data relating to the conduct and prosecution of each case.

We have carefully studied the data compiled by the AOPC and have found that in cases where a defendant did not present any mitigating circumstances and the prosecution proved at least one, and in most cases two or more, aggravating circumstances, the sentence of death has always been imposed. More importantly, in those cases that were identical to appellant's, that is where there were no mitigating circumstances and the same two aggravating circumstances (killing a person while in the perpetration of a felony and the defendant having a significant history of felony convictions involving the use or threat of violence to the person

(Footnote Continued)
held that the Federal Constitution does not require a proportionality review in every case in which the death sentence has been imposed.

¹⁴ This study is entitled "Pennsylvania Death Penalty Study," and it had been ordered by this Court in Commonwealth v. Frey, ____ Pa. ____, ____ A.2d ____ ([J-260-83]). This study is an ongoing one and we have imposed a continuing obligation on the President Judge of every county to supply updated data to ACPC on each First Degree Murder conviction.

42 Pa.C.S. §9711(d)(6)(g)) had been proved by the Commonwealth, all defendants received the death penalty.

In light of the findings in AOPC's study and our own independent evaluation of the entire record in this case, we conclude that the sentence of death imposed by the jury in the instant case was neither excessive nor disproportionate to penalties imposed in similar cases. Therefore, we sustain the conviction of murder in the first degree and affirm the sentence of death.¹⁵

FORMER CHIEF JUSTICE ROBERTS DID NOT PARTICIPATE IN THE DECISION OF THIS MATTER.

MR. CHIEF JUSTICE NIX FILES A DISSENTING OPINION.

APPENDIX B:

Order of the Supreme Court of the United States in
Maxwell v. Pennsylvania, No. A-9 (July 11, 1984)

¹⁵Because we have upheld the sentence of death imposed by the jury, we hereby direct the prothonotary of the Eastern District to transmit to the Governor, as soon as possible, the full and complete record of the trial, sentencing hearing, imposition of sentence, and review by this Court as required by 42 Pa.C.S. §9711(i).

Supreme Court of the United States

No. A-9

FEDERICK MAXWELL,

Petitioner,

v.

PENNSYLVANIA

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

It Is ORDERED that the time for filing a petition for writ of certiorari in
the above-entitled cause be, and the same is hereby, extended to and including

August 22, 1984.

APPENDIX C:

The Pennsylvania Death Sentencing Statute,
42 Pa. Cons. Stat. Ann. § 9711

/s/ William J. Brennan

Associate Justice of the Supreme
Court of the United States

Dated this 11th

day of July, 1984

Rudson's Pennsylvania Consolidated Statutes
Annotated

§ 9711 CRIMINAL SENTENCING

§ 9711

Definitions

(1) In general

Annotated Act was not applicable with respect to sentencing which occurred after the effective date of the Annotated Act (IARA) and

§ 9711

Criminal Law Statute in effect at time of offense.

C.J.A. Criminal Law § 9711 et seq.

Name of Definitions

(2) In general

Annotated Act was not applicable with respect to sentencing which occurred after the effective date of the Annotated Act (IARA) and

§ 9702. Definitions

"As used in this chapter "court" and "judge" include (when exercising criminal or quasi-criminal jurisdiction pursuant to section 1515 (relating to jurisdiction and venue)) a district justice.

1980, Oct. 5, P.L. 603, No. 142, § 401(a), effective in 60 days.

§ 9703. Scope of chapter

Except as otherwise specifically provided in this chapter, in all cases the sentence to be imposed shall be determined by the court as authorized by law.

1982, March 8, P.L. 169, No. 54, § 1, effective in 90 days.

SUBCHAPTER 3

SENTENCING AUTHORITY

Sec.

- 9711. Sentencing procedure for murder of the first degree.
- 9712. Sentences for offenses committed with firearms.
- 9713. Sentences for offenses committed on public transportation.
- 9714. Sentences for second and subsequent offenses.
- 9715. Life imprisonment for homicide.
- 9716. Two or more mandatory minimum sentences applicable.

§ 9711. Sentencing procedure for murder of the first degree

(a) Procedure in jury trials.—

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine

§ 9711

§ 9711

CRIMINAL SENTENCING

Whether the defendant shall be sentenced to death or life imprisonment.

(2) In the sentencing hearing, evidence may be presented as to any matter that the court deems relevant and admissible or the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e). Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

(3) After the presentation of evidence, the court shall permit counsel to present argument for or against the sentence of death. The court shall then instruct the jury in accordance with subsection (c).

(4) Failure of the jury to unanimously agree upon a sentence shall not impeach or in any way affect the guilty verdict previously recorded.

(b) Procedure in nonjury trials and guilty pleas.—If the defendant has waived a jury trial or pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant with the consent of the Commonwealth, in which case the trial judge shall hear the evidence and determine the penalty in the same manner as would a jury.

(c) Instructions to jury.—

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

- (i) the aggravating circumstances specified in subsection (d) as to which there is some evidence;
- (ii) the mitigating circumstances specified in subsection (e) as to which there is some evidence;

- (iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

- (iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circum-

§ 9711

evidence may be presented as being relevant and admissible on to be imposed and shall include aggravating or mitigating circumstances (d) and (e). Evidence of all be limited to those circumstances (d).

of evidence, the court shall permit for or against the sentence of instruct the jury in accordance

minimously agree upon a sentence way affect the guilty verdict

and guilty pleas.—If the defendant guilty, the sentencing pro- a jury impaneled for that purpose, the consent of the Court shall hear the evidence in manner as would a jury.

to consider the sentencing jury on the following matters: circumstances specified in subsection evidence.

stances specified in subsection evidence.

tances must be proved by the reasonable doubt; mitigating offered by the defendant by a pre-

sentence of death if the jury finds aggravating circumstance of no mitigating circumstance and one or more aggravating and no mitigating circum-

stances. The verdict must be a sentence of life imprisonment in all other cases.

(v) the court may, in his discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

(2) The court shall instruct the jury on any other matter that may be just and proper under the circumstances.

(f) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(1) The victim was a fireman, peace officer or public servant concerned in official detention, as defined in 18 Pa.C.S. § 5121 (relating to escape), who was killed in the performance of his duties.

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(8) The offense was committed by means of torture.

(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or

§ 9711 CRIMINAL PROCEDURES 48 PAGES
Death was impossible or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(g) Mitigating circumstances.—Mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal convictions.

(2) The defendant was under the influence of extreme mental or emotional disturbance.

(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(4) The age of the defendant at the time of the crime.

(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. § 309 (relating to duress), or acted under the substantial domination of another person.

(6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

(7) The defendant's participation in the homicidal act was relatively minor.

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

(f) Sentencing verdict by the jury.—

(1) After hearing all the evidence and receiving the instructions from the court, the jury shall deliberate and render a sentencing verdict. In rendering the verdict, if the sentence is death, the jury shall set forth in such form as designated by the court findings upon which the sentence is based.

(2) Based upon these findings, the jury shall set forth in writing whether the sentence is death or life imprisonment.

(g) Recording sentencing verdict.—Whenever the jury shall agree upon a sentencing verdict, it shall be received and recorded by the court. The court shall thereafter impose upon the defendant the sentence fixed by the jury.

defendant was undergoing a temporary insanity at the time of the offense. Mitigating circumstances shall include history of prior criminal conduct, the influence of extreme mental or emotional disturbance, the defendant's capacity to appreciate the crime or his conduct to the requirements of the law at the time of the crime, extreme duress, although not a defense to prosecution under this section, or acted under the influence of another person in the defendant's homicidal acts.

Section 46 The homicidal act was committed in the course of a felony or receiving the instruction to deliberate and render a sentence, if the sentence is such form as designated by the jury, shall set forth in death or life imprisonment.

Whenever the jury shall all be received and recorded to impose upon the defendant

(A) Review of death sentence.

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors in trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

(B) Record of death sentence to Governor.—Where a sentence of death is upheld by the Supreme Court, the prothonotary of the Supreme Court shall transmit to the Governor a full and complete record of the trial, sentencing hearing, imposition of sentence and review by the Supreme Court.

1974, March 26, P.L. 213, No. 46, § 3, ind. effective. As amended 1974, Dec. 30, P.L. 1052, No. 345, § 1, effective in 90 days; 1978, Sept. 13, P.L. 736, No. 141, § 1, ind. effective; 1980, Oct. 5, P.L. 682, No. 142, § 401(a), effective in 90 days.

Amended June

An originally enacted title section was:

"Committing of murder."

(a) Proceedings by Jury.—The jury before whom any person shall be tried for murder, shall, if they find such person guilty thereof, ascertain in their verdict whether the person is guilty of murder of the first degree, murder of the second degree or murder of the third degree.

(b) Instructions to jury and rendering verdict.—In a trial for murder, the court shall instruct the jury prior to their deliberations, as to the penalties for murder of the first degree, murder of the second degree and murder of the third degree. The court shall also inform the jury that if they find the defendant guilty of murder of the first degree, it will be their further duty to determine whether the killing was committed by any premeditated or wilful killing.

After such verdict is rendered and before the jury is permitted to separate, the court shall proceed to receive and

RESPONDENT'S BRIEF

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ALEXANDER L. STEVENS
CLERK

NO. 84-5350

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

FREDERICK M. MAXWELL, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

ERIC B. HENSON
Deputy District Attorney
(Counsel of Record)
STEVEN J. COOPERSTEIN
Assistant District Attorney
EDWARD G. RENDELL
District Attorney
Philadelphia County

1300 Chestnut Street
Philadelphia, Pennsylvania 19107
(215) 875-6010

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QUESTION PRESENTED

Does The Pennsylvania Death Penalty Statute,
Which Directs The Sentencing Jury To Consider
All Relevant Mitigating Circumstances Before
Deciding On Penalty, Conform With Constitutional
Requirements?

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passim

OPINION BELOW

The opinion of the Pennsylvania Supreme Court, Commonwealth v. Maxwell, No. 42, E.D. Appeal Docket 1982 (Pa. filed 5/24/84), is reproduced at Petitioner's Appendix A.

JURISDICTION

Petitioner seeks review by writ of certiorari pursuant to 28 U.S.C. §1257(3). The Commonwealth concedes that this Court has jurisdiction to consider the petition, but, for the reasons stated below, urges that this is not an appropriate case for granting certiorari.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

United States Constitution, Eighth Amendment:

Excessive bail shall not be required,
nor excessive fines imposed, nor cruel
and unusual punishments inflicted.

United States Constitution, Fourteenth Amendment:

... nor shall any State deprive any
person of life, liberty, or property,
without due process of law; ...

The Pennsylvania death penalty statute,
42 Pa.C.S.A. §9711, which is set forth in its
entirety in Petitioner's Appendix C.

STATEMENT OF THE CASE

Petitioner, Frederick M. Maxwell, was convicted of first degree murder and sentenced to death for the planned execution of an encyclopedia salesman, Paul Kent. After the murder, petitioner fled to New York City, abandoning his children. More than a year later, petitioner was arrested in New York and then extradited to Philadelphia.

Beginning on April 24, 1981, petitioner was tried before a jury presided over by the Honorable Juanita Kidd Stout. After a 10-day trial, the jury convicted petitioner of first degree murder, 18 Pa.C.S.A. §2502(a), robbery, 18 Pa.C.S.A. §3701, and possessing an instrument of crime, 18 Pa.C.S.A. §907. Defendant does not here question the constitutional validity of these guilty verdicts. The evidence upon which they were based is as follows.

In May 1979, petitioner requested Encyclopedia Britannica to send a salesman to his home to discuss selling a set of the encyclopedia. Paul Kent did so and a contract was signed (N.T.

56, 61-64, 467). Petitioner had no money, however, and was in serious financial trouble (N.T. 468, 500). A week later, on Friday, June 1, 1979, petitioner, in the presence of co-defendant Gary Mobley, instructed his paramour, Hilda Gasper, to call Mr. Kent's office and ask Mr. Kent to return to petitioner's home (N.T. 82, 469-473). On June 5, 1979, Gasper called Mr. Kent's office as petitioner instructed (N.T. 469). When Mr. Kent had not arrived by noon, petitioner directed Gasper to call again (N.T. 473).

Shortly before Mr. Kent's arrival, petitioner had Gary Mobley buy trash bags at a nearby store, although petitioner's family did not use trash bags. Petitioner instructed Gasper to go upstairs and "get the children ready to go out," because he was going to rob Mr. Kent and kill him "if he had to." (N.T. 474-475). Shortly afterwards, Gasper heard two shots from downstairs; when she descended, she saw Paul Kent's body slumped in a chair, in petitioner's and Mobley's presence (N.T. 476). Mr. Kent had been shot twice in the head at close range.

(N.T. 100-106). Petitioner and Mobley carried Mr. Kent's body to the cellar, while Gasper washed the victim's blood from the wall, the chair and the carpet (N.T. 477-478). Mr. Kent's body was later found in the cellar bound with rope, jammed into five trash bags and abandoned in the corner.

The group now prepared to capitalize on their actions. Petitioner, Mobley and Gasper took Mr. Kent's wallet and then drove to Wanamaker's Department Store in center city Philadelphia (N.T. 480). On the way Mobley said he would return that night to help dispose of the body (N.T. 484). The conspirators agreed they had removed all fingerprints from the trash bags (N.T. 497). At Wanamaker's, petitioner purchased two television sets using Mr. Kent's credit cards. He also bought Gasper a new purse (N.T. 482-483, 769). Later, when petitioner appeared at the pick-up point for the televisions, the Wanamaker's salesman, already suspicious, had returned the sets to the department (N.T. 166-167; 482-483). Petitioner aban-

doned his attempt to obtain the sets and drove home.

The next day, petitioner broke the cellar door to prevent his teen-age daughters from going into the cellar. Gasper wrote a note to the children explaining the "accident" to the door and said that she and petitioner would return shortly from a shopping trip (N.T. 485-489).

In fact, petitioner and Gasper drove to New York City, abandoning the children, including an infant, in the house (N.T. 489). Mr. Kent's body was discovered the next day by petitioner's teen-age daughters, who alerted the police (N.T. 195-202; 230-232; 236; 366; 38;; 431-433). The fugitives never returned, warned by petitioner's mother that the police were looking for them (N.T. 490, 859). Fourteen months later, petitioner was arrested by New York City police. He had false identification and still possessed Mr. Kent's Wanamaker's credit card, all of which he destroyed following his arrest (N.T. 661-675).

Before trial, petitioner believed that Gasper would testify for him and prepared a

lengthy, false chronology of the events of June 5, 1979, and later. He told Gasper to recopy the chronology in her own handwriting and to give a copy to petitioner's counsel (N.T. 545-560). Instead, Gasper delivered this fabrication to the prosecutor (N.T. 545, 569-572).

Petitioner testified as the sole defense witness. He admitted that Mr. Kent had visited Maxwell's home, in Gary Mobley's presence, for the purpose of selling the encyclopedia (N.T. 752). He also admitted driving Mr. Kent's car and using Mr. Kent's credit cards both in Philadelphia and in New York (N.T. 769, 832). Petitioner, however, denied murdering Mr. Kent. The jury rejected his attempt to shift responsibility for the murder onto an individual identified only as "Pop" (N.T. 766, 772).

Following the jury's guilty verdicts, the trial court reconvened the jury pursuant to 42 Pa.C.S.A. §9711 for consideration of penalty. The prosecutor presented evidence that petitioner had been convicted of three earlier violent crimes in New York: two robberies and a felony weapons offense (N.T. 1188-1203). Petitioner

again testified in his own behalf. He denied criminal involvement in the Kent murder as well as the earlier New York felonies (N.T. 1226-1236).

Following counsels' summations and the court's instructions concerning the statutory aggravating and mitigating circumstances, the jury found two aggravating circumstances beyond a reasonable doubt -- that petitioner committed the killing while in the perpetration of a felony, 42 Pa.C.S.A. §9711(d)(6), and that petitioner had a significant history of convictions for violent felonies, 42 Pa.C.S.A. §9711(d)(9) -- but no mitigating circumstances, and, accordingly, returned a verdict of death. On June 9, 1982, Judge Stout denied petitioner's post-verdict motions and sentenced him to death.

Petitioner appealed to the Pennsylvania Supreme Court. The court affirmed the sentence of death; one justice dissented and one did not participate. Commonwealth v. Maxwell, No. 42, E.D. Appeal Docket 1982 (Pa. filed 5/24/84). Petitioner seeks certiorari, contending that the sentence of death cannot stand because the

Pennsylvania death penalty statute is unconstitutional in requiring the sentencing jury to return a verdict of death once it finds the existence of aggravating factors and the absence of mitigating factors.

SUMMARY OF ARGUMENT

Despite the poignance of his subject, petitioner's attack on the Pennsylvania death penalty statute is frivolous. The statute is legally indistinguishable from other state statutes that this Court has approved. Under the statute, if the sentencer finds one or more aggravating circumstances, it must return a death verdict only if it finds the absence of mitigating circumstances after a full consideration of any relevant evidence the defense may present. Thus the Pennsylvania statute is nothing like the "mandatory" death penalty statutes invalidated by this Court. Petitioner has not presented any challenge to the Pennsylvania death penalty statute that warrants this Court's review.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI SINCE THE PENNSYLVANIA DEATH PENALTY STATUTE IS CLEARLY IN CONFORMITY WITH THE CONSTITUTIONAL GUIDELINES ESTABLISHED IN PREVIOUS CASES

The Pennsylvania death penalty statute, 42 Pa.C.S.A. §9711, was enacted in response to this Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972). Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442 (1977) cert. denied 438 U.S. 914, 98 S.Ct. 3143 (1978) (striking down former death penalty statute as too restrictive of sentencer's consideration of possible mitigating factors). This state statute thus controls sentencing discretion by setting objective standards for the imposition of the death penalty. Gregg v. Georgia, 428 U.S. 153, 198, 96 S.Ct. 2909, 2936 (1976). Pennsylvania's statute lists ten aggravating circumstances, 42 Pa.C.S.A. §9711(d), which must be proved by the prosecution beyond a reasonable doubt, 42 Pa.C.S.A. §9711(c)(1)(iii), and eight mitigating circumstances, 42 Pa.C.S.A. §9711(e), which must be proved by the accused by a prepon-

derance of the evidence, 42 Pa.C.S.A. §9711(c)(1)(iii). If the sentencer finds the existence of at least one aggravating and no mitigating circumstances, then the verdict must be death. 42 Pa.C.S.A. §9711(c)(1)(iv).

Petitioner asserts that this aspect of the Pennsylvania statute unconstitutionally restricts the sentencer's discretion. Petitioner rails against exactly what Furman mandated: a statute that channels the sentencer's discretion so as to minimize the risk of arbitrary and capricious verdicts. The statute clearly complies with this Court's constitutional directives. Petitioner's frivolous objection to the statute does not merit this Court's discretionary review.¹

In Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950 (1976), this Court upheld a death penalty statute that, although different in form from Pennsylvania's, is in the relevant respect legally

1. This Court has previously declined to review the Pennsylvania Supreme Court's holding that the Pennsylvania death penalty statute is constitutional. Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), cert. denied 103 S.Ct. 2444 (1983).

indistinguishable. The Texas murder statute defines five classes of "capital" murder that correspond to many of the aggravating circumstances contained in the Pennsylvania law. If the jury returns a guilty verdict on one of the classes of capital murder, then at the penalty stage, the jury is required to consider first any evidence of mitigating circumstances which were presented to it. Jurek v. Texas, 428 U.S. at 273-274, 96 S.Ct. at 2957. If the jury finds that there are no mitigating circumstances, then it must return a verdict of death. Jurek v. Texas, 428 U.S. at 269, 96 S.Ct. at 2955. Thus, the Texas death penalty scheme is in this respect indistinguishable from the Pennsylvania statute. Since the Texas statute is constitutional, review of the Pennsylvania statute would waste judicial resources. The petition for writ of certiorari should be denied.

Petitioner, who does not even cite Jurek in his petition, likens the Pennsylvania statute to those held unconstitutional in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976), and Roberts v. Louisiana, 428 U.S. 325,

96 S.Ct. 3001 (1976). The two statutes reviewed in those cases defined capital murder, and required imposition of the death penalty for capital murder without consideration of any mitigating circumstances. This Court held that the sentencer must be allowed to consider "... the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. at 304, 96 S.Ct. at 2991; see Commonwealth v. Moody, supra. Pennsylvania's statute, unlike the North Carolina and Louisiana statutes, requires the sentencer to consider any evidence of mitigation that a defendant may present. 42 Pa.C.S.A. §9711(e).

Petitioner is nonetheless able to deceive himself that he sees a likeness in the statutes by the pretense that his jury was not permitted properly to consider mitigation. In fact, the trial court here, after a full hearing and argument by counsel, instructed the jury on all statutory mitigating factors (N.T. 1264-1265). That the jury was unable to find any mitigation

from the evidence does not render the statutory procedure unconstitutional.

Petitioner also likens the Pennsylvania statute to those of North Carolina and Louisiana because Pennsylvania does not allow the sentencer to make a subjective determination of whether the death penalty is "appropriate" once it finds one or more aggravating but no mitigating circumstances. Far from violating the constitution, however, the absence of such unguided discretion helps to ensure that the death penalty will be enforced uniformly rather than arbitrarily. Indeed, in Roberts this Court condemned a statutory system that risked inviting "... the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate." Roberts, 428 U.S. at 335, 96 S.Ct. at 3007. Thus, contrary to petitioner's argument, the constitution forbids the sentencer to consider subjectively the "appropriateness" of the death penalty after it has determined the existence of aggravating and mitigating circumstances and, when necessary, assessed their relative weights.

Moreover, the Pennsylvania statute provides for automatic review of every death sentence by the state Supreme Court. 42 Pa.C.S.A. §9711 (h)(1). The Pennsylvania Supreme Court must vacate the sentence of death and impose a life imprisonment sentence if: (1) the death sentence resulted from passion, prejudice or other arbitrary factor; (2) the aggravating circumstance is not sustained by the evidence; or (3) the death sentence is disproportionate when compared to other sentences. 42 Pa.C.S.A. §9711 (h)(3). This additional safeguard of automatic and thorough appellate review ensures that the death penalty is imposed fairly, uniformly, and only in appropriate cases. This meaningful appellate review further compels a finding that the Pennsylvania death penalty statute is constitutional.

The Pennsylvania death penalty statute does not differ significantly from laws this Court has sanctioned. It provides clear and definite guidelines to channel the sentencer's discretion in choosing between life imprisonment and death, and requires the sentencer to consider

all relevant mitigating circumstances before making its decision. Finally, the sentencer's decision is thoroughly reviewed by the Pennsylvania Supreme Court as a further guarantee that this penalty will be used uniformly and proportionately. Therefore, petitioner's attack on the death penalty statute is obviously frivolous, and this Court should decline to review it.

CONCLUSION

For the foregoing reasons, respondent,
the Commonwealth of Pennsylvania, respectfully
requests that the petition for writ of certiorari
to the Pennsylvania Supreme Court be denied.

Respectfully submitted,

Eric B. Henson

ERIC B. HENSON
Deputy District Attorney

Steven J. Cooperstein

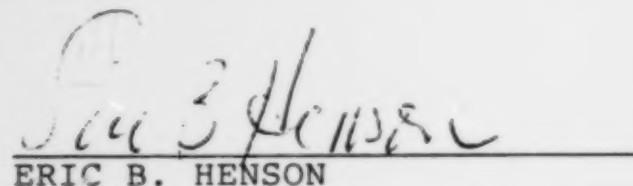
STEVEN J. COOPERSTEIN
Assistant District Attorney
EDWARD G. RENDELL
District Attorney
Philadelphia County

IN THE SUPREME COURT OF THE UNITED STATES

FREDERICK M. MAXWELL, : OCTOBER TERM, 1983
Petitioner :
:
v. :
:
COMMONWEALTH OF PENN- : NO. 84-5350
SYLVANIA Respondent :

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, Counsel for Respondent hereby certify that I have served three (3) copies of this Brief for Respondent in Opposition to Petition for Writ of Certiorari by mail delivery upon counsel for petitioner, Deval L. Patrick, Esquire, 99 Hudson Street, 16th Floor, New York, New York 10013, on September 19, 1984.



ERIC B. HENSON

Sworn to and subscribed :
before me this 19th day :
of September, 1984, A.D.:



NOTARY PUBLIC

NOTARY PUBLIC
Notary Public Office, Philadelphia,
Pennsylvania, dated Sept. 19, 1984

**REPLY
BRIEF**

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No. 84-5350
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

FREDERICK M. MAXWELL,

Petitioner,

-vs.-

THE COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSLYVANIA

PETITIONER'S REPLY BRIEF

DEVAL L. PATRICK
99 Hudson Street
New York, New York 10013

ATTORNEY FOR PETITIONER
AND COUNSEL OF RECORD

No. 84-5350

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

FREDERICK M. MAXWELL,

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-vs.-

THE COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSLYVANIA

Petitioner stands by the presentation of law in his petition for certiorari. This reply serves only to inform the Court of two factual misrepresentations in the Commonwealth's brief in opposition. Both occur in the paragraph that begins on page 3 and continues on page 4 of the Commonwealth's brief.

First, the Commonwealth states that after petitioner requested Encyclopedia Britannica to send a salesman, "Paul Kent did so and a contract was signed." Brief for Respondent in Opposition at 3. The Commonwealth cites pages of the trial transcript as authority for its statement. However, nothing in those pages or anywhere else in the record evidence establishes that a contact was actually signed, only that one was prepared for signature.

Second, the Commonwealth states that, "A week later, on Friday, June 1, 1979 [after Mr. Kent's first visit to the Maxwell home], petitioner, in the presence of co-defendant Gary Mobley, instructed his paramour, Hilda Gasper, to call Mr. Kent's office and ask Mr. Kent to return to petitioner's home." Brief for Respondent in Opposition at 4. Again, the Commonwealth cites to

the trial transcript and again nothing there or elsewhere supports the statement. Rather, all the record evidence shows is that the second call was made to Kent's office on June 5, 1979, the day of his death.

Petitioner objects to what he views as the Commonwealth's attempt to imply what it failed to prove at trial: that the petitioner and his co-defendant conspired to kill Mr. Kent and lay in wait for him. Although these misstatements may not be relevant to the question presented in this petition -- whether Pennsylvania's death sentencing statute is unconstitutionally mandatory on its face and as applied -- petitioner is in earnest that the gravity of this offense not be unfairly represented.

Respectfully submitted,


DEVAL L. PATRICK
99 Hudson Street
New York, New York 10013
(212) 219-1900

ATTORNEY FOR PETITIONER

Dated: October 9, 1984

OPINION

2

SUPREME COURT OF THE UNITED STATES

FREDERICK MAXWELL v. PENNSYLVANIA

**ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF PENNSYLVANIA, EASTERN DISTRICT**

No. 84-5350. Decided October 29, 1984

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom **JUSTICE BRENNAN** joins,
dissenting.

I would grant certiorari to consider the constitutionality of the Pennsylvania death penalty statute, under which the jury must impose a death sentence upon a finding of one aggravating circumstance and no mitigating circumstances. Such a scheme precludes any individualized consideration that "death is the appropriate punishment in a specific case," *Lockett v. Ohio*, 438 U. S. 586, 601 (1978) (plurality opinion), quoting *Woodson v. North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.), virtually eliminates the possibility of a mercy verdict, and absolves the jury from the obligation of taking moral responsibility for its actions.

I

Maxwell was convicted of first-degree murder, a crime punishable by death in Pennsylvania. At the sentencing hearing, the State presented evidence of two aggravating circumstances. Maxwell did not present any evidence of mitigating circumstances, and the jury failed to find mitigating circumstances. *Commonwealth v. Maxwell*, — Pa. —, 477 A. 2d 1309 (1984). Maxwell's counsel, however, made a plea for mercy.

Under the Pennsylvania death penalty statute, "the verdict *must* be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance . . ." 42 Pa. Cons. Stat. § 9711(c)(1)(iv)

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(1980) (emphasis added). The trial judge's instruction to the jury paraphrased the language of the statute.

In construing the statute, the Pennsylvania Supreme Court has stated that where no mitigating circumstances are found, "one aggravating circumstance alone requires a verdict of death." *Commonwealth v. Beasley*, — Pa. —, —, 475 A. 2d 730, 738, n. 3 (1984) (emphasis added). Indeed, in considering Maxwell's appeal, that court stated that because Maxwell "did not introduce any evidence of mitigating circumstances, it became unnecessary to 'weigh' opposing circumstances." *Commonwealth v. Maxwell*, — Pa., at —, 477 A. 2d, at 1317-1318.

II

I am troubled by Pennsylvania's mechanical imposition of the death penalty. Under the Pennsylvania death penalty statute, once the jury fails to find mitigating circumstances, it is precluded from making any further inquiry. At that point, in returning its verdict—the most serious judgment that our society can render—the jury acts in a merely ministerial capacity. The legislature and the courts have barred independent decisionmaking.

The Pennsylvania statute, as interpreted by its courts, raises two substantial questions that are worthy of this Court's attention. The first is whether placing such severe constraints on the jury is consistent with the requirement of individualized punishment in capital cases. See *Lockett v. Ohio*, *supra*, at 601. The problem posed by the "mandatory" aspect of death penalty schemes in which the jury must return a death sentence without considering the appropriateness of such a sentence was discussed by JUSTICE STEVENS in *Smith v. North Carolina*, 459 U. S. 1056 (1982) (respecting denial of certiorari). In *Smith*, the jury was required to make three findings:

- "(1) that one or more aggravating circumstances existed;
- (2) that the aggravating circumstances were sufficiently

substantial to call for the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances." *Id.*, at 1156.

JUSTICE STEVENS' concern was that a North Carolina jury might answer the second and third questions in the affirmative and yet be in doubt about the proper penalty. Under the Pennsylvania statute at issue here, the jury not only makes no determination on the propriety of the death sentence but is also denied the opportunity to rule on the second question, since the legislature has already made that decision. Thus, the jury's findings here are even further removed from the question whether death is the appropriate punishment.

More importantly, this issue is squarely presented in this case, whereas it was not in *Smith*. In *Smith*, the jury instructions could have been read "as merely requiring that the death penalty be imposed whenever the aggravating circumstances, discounted by whatever mitigating factors exist, are sufficiently serious to warrant the extreme penalty." *Id.*, at 1056-1057. Under this reading, of course, the instructions would have complied with the *Lockett* requirement of an individualized determination of the appropriateness of the death penalty. JUSTICE STEVENS thus concluded that the Court should not examine the constitutionality of the statute until this statute had been authoritatively construed by the North Carolina courts. Here, in contrast, the Pennsylvania Supreme Court has expressly foreclosed any reading that would make the statute consistent with *Lockett*.

These severe limitations on the role of the jury take on crucial significance in light of the fact that Maxwell's sole strategy at his sentencing hearing was to present a plea for mercy. This Court has stated that it is constitutionally permissible for the jury "to dispense mercy on the basis of factors too intangible to write into a statute." *Gregg v. Georgia*, 428 U. S. 153, 222 (1976) (WHITE, J., concurring in judgment); see *Zant v. Stephens*, 462 U. S. 862, 875-876,

n. 13 (1983). And *Lockett v. Ohio* suggests that the possibility of a mercy verdict—a verdict based on unarticulated and perhaps unarticulable reasons—cannot be constitutionally foreclosed, for otherwise there would be no assurance that the death penalty was not imposed “in spite of factors which may call for a less severe penalty.” 438 U. S., at 605. But here, the jury was expressly not given any opportunity to consider whether death was proper. Thus, in order to consider Maxwell’s mercy plea the jury would have had to categorize it as one of eight mitigating circumstances. It seems to me that even the broadest mitigating circumstance in the Pennsylvania statute—“the character and record of the defendant and ‘the circumstances of his offense,’ 42 Pa. Cons. Stat. § 9711(e)(8) (1980)—is too restrictive to allow proper consideration of intangible factors.

This problem is magnified here because the absence of mitigating circumstances ended the jury’s inquiry. Had the jury balanced aggravating against mitigating circumstances, it would have had another opportunity to take intangibles into account. In addition, at that stage the jury would have been engaged in a more subjective assessment, an assessment perhaps somewhat conducive to the consideration of factors that a juror is persuaded by but cannot articulate. Maxwell’s jury never performed this inquiry. For this reason too, the problem here is more serious than that at stake in *Smith*.

III

My second, related concern is whether Maxwell’s streamlined sentencing hearing gave the jury the opportunity to reflect on the magnitude of the decision it was about to make, and to assume moral responsibility for that decision. As far back as in *McGautha v. California*, 402 U. S. 183, 207 (1971), this Court stressed the importance that “jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision.” Here, all that the jurors actually did was

to consider whether aggravating and mitigating circumstances had been proved. The finding that there was at least one aggravating circumstance and no mitigating circumstances precluded any further inquiry. But findings on questions such as “[t]he age of the defendant at the time of the crime,” 42 Pa. Cons. Stat. § 9711(e)(4) (1980), are far removed from what really is at stake in a capital case. I have little faith that a jury told that it is restricted to deciding peripheral issues will ever be aware of, or focus on, the serious consequences of its decision.

The problem here, however, goes beyond a concern that the jury may not take its role seriously enough. Mercy—which I have already identified as a necessary component of capital decisionmaking—cannot be dispensed in a vacuum. It is unlikely that a jury whose inquiry is limited to peripheral factors, far removed from the ultimate question of life or death, will ever turn its attention to whether the exercise of mercy is warranted.

IV

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg v. Georgia*, *supra*, at 231 (MARSHALL, J., dissenting); *Furman v. Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). The issue in this case, however, is such that I would grant review of the sentence even if I accepted the prevailing view that the death penalty may be constitutionally imposed under certain circumstances. I believe that this Court should consider whether the death penalty may constitutionally be mandated merely upon a finding of the existence of at least one aggravating circumstance and the lack of mitigating circumstances. For that reason, I respectfully dissent.